A **SHAHIDAN SHAFIE v. ATLAN HOLDINGS SDN BHD & ANOR**

COURT OF APPEAL, PUTRAJAYA
DAVID WONG DAK WAH JCA
UMI KALTHUM ABDUL MAJID JCA
ZAMANI A RAHIM JCA
B [CIVIL APPEAL NO: W-02-1801-08-2012]
18 SEPTEMBER 2015

C ***COMPANY LAW:*** *Take-over and merger – Take-over – Claim for damages by shareholder – Whether s. 153 of Securities Commission Malaysia Act 1993 conferred on shareholder private cause of action for damages on alleged breach of statutory duty – Whether shareholder lodged complaint to Securities Commission before coming to court – Shareholder's right to sue – Whether only exists when Securities Commission had made ruling – Whether Securities Commission made any ruling*

D The Kuala Lumpur Stock Exchange ('the KLSE') had issued a notice to Naluri Berhad ('Naluri') informing the latter that its level of operation did not meet that of required under Practice Note 10/2001 ('PN 10') of the Listing Requirements of the KLSE. This could result in Naluri's shares being suspended and subsequently de-listed from the KLSE. Naluri entered into various corporate exercises and this included the sale of its shares by way of
E a tender exercise. The second respondent ('the second defendant') submitted a tender bid to acquire Naluri's pledged shares and the same was accepted by Pengurusan Danaharta Nasional Berhad, a company that manages the affairs of distressed companies such as Naluri. As part of the purchase of Naluri's pledged shares, the second defendant was obliged to ensure that
F Naluri maintain its PN 10 status. This resulted in PN 10 proposal which was undertaken pursuant to the work out proposal and was deemed to be completed. With that completion, the Board of Directors took over the administration of Naluri. The completion of the purchase agreement prompted the appellant ('the plaintiff') to commence an action at the High
G Court in his capacity as a shareholder of Naluri, for an order that the defendants, jointly and severally, make a mandatory take-over offer ('MTO') to all shareholders at an offer price of RM1.98 per ordinary share in accordance with the terms of the Securities Commission Malaysia Act 1993 ('the SC Act') and Take-Over Code ('the Code') and for damages. The High
H Court dismissed the plaintiff's claims on the grounds that the SC Act does not confer on the plaintiff a private cause of action for damages on the alleged breach of statutory. Hence, present appeal. The issue that arose for the court's adjudication was whether s. 153 of the SC Act gives a private cause of action for breach of a statutory duty which in this case was the MTO to other shareholders of Naluri to purchase their shares.

I

Held (dismissing appeal with costs)
Per David Wong Dak Wah JCA delivering the judgment of the court:

(1) It is the intention of Parliament for the Securities Commission ('the SC') to be tasked to supervise, regulate, issue rulings from time to time and enforce the practices of companies bound by the SC Act and the Code. The only remedy available to the plaintiff was to complain to the SC about the conduct of the defendants and if the SC failed to act or make a ruling unfavourable to the plaintiff, his only option was to apply to the court for judicial review of the decision of the SC. The SC was aware of the allegation of the defendants having acquired control of Naluri and had sought clarification from the Board of Directors of Naluri. After considering Naluri's clarification, the SC took no further action. The plaintiff's right to sue could only exist when the SC had made a ruling. The plaintiff should have sought a review of the SC's decision in court. This he did not do. (paras 26 & 28)

(2) The court's interpretation reconciles s. 153 with the other provisions in the SC Act; the private cause of action for breach of statutory duty is preserved to the extent only after the SC has made a specific ruling. This would avoid a situation where there would be two decisions; one of the court and the other the SC. This scenario would bring uncertainty to the business world which must be avoided. The court's interpretation allowed only one decision at one time and that was the decision of the SC until the same is either set aside or substituted by the courts. (para 29)

Bahasa Malaysia *Headnotes*

Bursa Saham Kuala Lumpur ('BSKL') mengeluarkan notis kepada Naluri Berhad ('Naluri'), memaklumkan Naluri bahawa tahap operasinya tidak mencapai tahap yang dikehendaki oleh Nota Amalan 10/2001 ('PN10') Syarat Penyenaraian BSKL. Ini boleh menyebabkan saham Naluri tergantung dan tersingkir daripada senarai BSKL. Naluri mengambil pelbagai langkah korporat dan ini termasuk jualan sahamnya melalui tender. Responden kedua ('defendan kedua') membuat bidaan tender untuk mengambil alih saham cagaran Naluri dan ini diterima oleh Pengurusan Danaharta Nasional Berhad, syarikat yang menguruskan hal ehwal syarikat-syarikat mundur seperti Naluri. Sebagai sebahagian belian saham cagaran Naluri, defendan kedua berkewajipan memastikan Naluri mengekalkan status PN10. Ini menghasilkan cadangan PN10 yang diambil susulan cadangan kerja dan dikatakan sudah selesai. Dengan selesainya itu, Lembaga Pengarah mengambil alih pentadbiran Naluri. Dengan termeterainya perjanjian belian, perayu ('plaintif') memulakan satu tindakan di Mahkamah Tinggi dalam kapasitinya sebagai pemegang saham Naluri, bagi satu perintah agar defendan, secara bersesama dan berasingan, membuat tawaran ambil alih mandatori ('MTO') kepada semua pemegang saham dengan harga tawaran RM1.98 per saham biasa, selaras dengan terma-terma Akta

Suruhanjaya Sekuriti Malaysia 1993 ('Akta SS') dan Kod Ambil Alih ('Kod') dan bagi ganti rugi. Mahkamah Tinggi menolak tuntutan plaintif atas alasan Akta SS tidak memberi plaintif kausa tindakan persendirian bagi ganti rugi terhadap pelanggaran kewajipan statutori yang didakwa. Oleh itu, timbul rayuan ini. Isu berbangkit yang perlu diputuskan oleh mahkamah adalah sama ada s. 153 Akta SS memberi kausa tindakan persendirian bagi pelanggaran kewajipan statutori yang dalam kes ini adalah MTO buat pemegang-pemegang saham Naluri untuk membeli saham mereka.

Diputuskan (menolak rayuan dengan kos)

Oleh David Wong Dak Wah HMR menyampaikan penghakiman mahkamah:

(1) Parlimen meniatkan agar Suruhanjaya Sekuriti ('SS') bertugas menyelia, mengawal, mengeluarkan peraturan dari masa ke masa dan menguatkuasakan amalan syarikat-syarikat yang terikat dengan Akta SS dan Kod. Satu-satunya remedi yang ada buat plaintif adalah mengadu kepada SS tentang tindakan defendan-defendan dan jika SS gagal bertindak atau membuat peraturan yang tidak berpihak pada plaintif, pilihannya hanyalah memohon semakan kehakiman keputusan SS daripada mahkamah. Suruhanjaya Sekuriti sedar akan dakwaan defendan-defendan mengambil alih kawalan Naluri dan telah memohon penjelasan Lembaga Pengarah Naluri. Selepas mempertimbangkan penjelasan Naluri, SS tidak mengambil tindakan susulan. Hak plaintif mengambil tindakan hanya timbul apabila SS membuat peraturan. Plaintif sepatutnya memohon semakan keputusan SS di mahkamah. Ini tidak dilakukan.

(2) Tafsiran mahkamah menyelaraskan s. 153 dengan peruntukan-peruntukan lain Akta SS; kausa tindakan persendirian hanya timbul selepas SS membuat peraturan khusus. Ini mengelakkan situasi yang menghasilkan dua keputusan; satu daripada mahkamah dan satu lagi daripada SS. Keadaan ini menimbulkan ketidakpastian dalam dunia perniagaan dan semestinya dielak. Tafsiran mahkamah hanya membenarkan satu keputusan pada satu masa iaitu keputusan SS hingga keputusan tersebut diketepikan atau diganti oleh mahkamah.

Case(s) referred to:

Aun Huat & Brothers Sdn Bhd & Ors v. Sime Darby Bhd & Anor [2003] 8 CLJ 32 HC ***(refd)***

Extreme System Sdn Bhd v. Ho Hup Construction Company Bhd & Ors (No. 2) [2010] 1 LNS 479 HC ***(refd)***

K & S Lake City Freighters Pty Ltd v. Gordon & Gotch Ltd (1985) 157 CLR 309 ***(refd)***

Petaling Tin Bhd v. Lee Kian Chan & Ors [1994] 2 CLJ 346 SC ***(refd)***

Tuan Hj Zulkifli Hj Hussain & Ors v. IOI Corporation Bhd & Ors [2012] 4 CLJ 401 HC ***(refd)***

X (minors) v. Bedforshire City Council [1995] 3 WLR 152 ***(refd)***

Legislation referred to:
Securities Commission Malaysia Act 1993, s. 153

For the appellant - KM Chan & KY Lui; M/s Lim Kian Leong & Co
For the 1st respondent - K Kirubakaran & S Malar; M/s Kiru & Yong
For the 2nd respondent - Joseph Yeo; M/s Kiru & Yong

[Editor's note: For the High Court judgment, please see Shahidan Shafie v. Atlan Holdings Bhd & Anor [2013] 4 CLJ 1029 (affirmed).]

Reported by Najib Tamby

JUDGMENT

David Wong Dak Wah JCA:

Introduction

[1] This is an appeal by the appellant/plaintiff against the decision of the High Court, Kuala Lumpur in which the learned judge dismissed the appellant's claims for an order that the respondents/defendants jointly and severally make a mandatory take-over offer to all shareholders of Naluri Berhad (except Danaharta) at an offer price of RM1.98 per ordinary share as per the terms set out in the Securities Commission Malaysia Act 1993 and the Take-Over Code.

[2] We heard the appeal on 2 July 2015 and reserved our decision to consider the submissions of respective counsel. We have since done that and now give our decision together with grounds.

[3] For ease of reference, the appellant shall be referred to as the plaintiff, the first respondent as the first defendant and the second respondent as the second defendant.

Background Facts

[4] Naluri Berhad (Naluri) was a public listed company with an authorised capital of RM2,000,000,000. The fully paid and issued share capital was RM690,516,320 of which Pengurusan Danaharta Nasional Berhad (Danaharta) had a charge on 309,648,000 shares which amounted to 44.84% of the Naluri issued and paid up capital (Naluri pledged shares).

[5] At this juncture, it would be appropriate to say a few words on the nature of Danaharta's powers. It is a public company incorporated under the Companies Act 1965 with the ownership vested in the Minister of Finance Incorporated. It was established by the Federal Government with the predominant purpose of acting as an asset management company and to acquire, manage, finance and dispose of assets and liabilities from distressed companies. To facilitate the achievement of that purpose, Danaharta is given two special powers:

(a) to buy assets through statutory vesting,

(b) to, if deem necessary, appoint special administrator to manage the affairs of distressed companies.

[6] In view of the financial position of Naluri, Danaharta on 23 December 2002 appointed special administrators (the SAs) of Naluri pursuant to the provisions of the Pengurusan Danaharta Nasional Berhad Act 1998 (Danaharta Act).

[7] On 18 April 2003, the then Kuala Lumpur Stock Exchange (KLSE) issued a notice to Naluri informing the same that its level of operation did not meet the level of operation as required under Practice Note 10/2001 of the listing requirements of KLSE. Such failure if not remedied could result in Naluri's shares being suspended and subsequently delisted from the KLSE.

[8] To deal with the aforesaid notice, the SAs proposed that Naluri enters into various corporate exercises and as part of that exercise was the sale of shares of Naluri. That sale was by way of a tender exercise and it was done under the following conditions:

(a) interested parties were invited to submit offers to acquire a block of shares (the "shares") representing approximately 44.84% of the issued and paid-up capital of Naluri based on Naluri's existing share capital (excluding conversion of any warrants issued by Naluri and which remain outstanding). The shares currently consisted of 309,648,000 ordinary shares of RM1 each in Naluri. The principal terms and conditions of the sale by tender were contained in terms of reference available from Danaharta;

(b) Naluri was listed on the main board of the KLSE. On 23 December 2002, the SAs of Naluri were appointed in accordance with the Danaharta Act. On 18 April 2003, Naluri announced that:

(i) the SAs had decided that it was in the best interest of all stakeholders of Naluri for Naluri to proceed with a capital repayment (the "proposed capital repayment") of at least RM690,516,320 on the basis of RM1 for each existing share in Naluri; and

(ii) Naluri had received a notice from the KLSE informing Naluri that it was determined as having inadequate level of operations in accordance with Practice Note No. 10/2011 ("PN10") of the KLSE listing requirements;

(c) a prospective bidder should consider the possible effects of the proposed capital repayment on the share capital of Naluri (including but not limited to any bonus or other share issue or consolidating, share split, conversion or cancellation of shares) as well as the effects of any conversion of existing warrants issued by Naluri. Based on Naluri's

unaudited financial statements for the year ended 31 December 2002 announced on 28 February 2003, Naluri had 138,078,312 outstanding warrants;

(d) a prospective bidder should also consider the consequences of the KLSE's classification of Naluri as an affected listed issuer under Practice Note No 10/2011 (PN10). Under PN10, the KLSE might suspend trading in shares of Naluri and subsequently delist the shares of Naluri from the KLSE if Naluri failed to comply with its obligations prescribed in PN10. Given that the successful bidder would be a substantial shareholder of Naluri, the successful bidder might wish to pursue with the SAs a proposal to ensure that Naluri had a level of operations that was adequate to warrant continued trading and/or listing of Naluri to comply with the requirements under PN10.

[9] The second defendant took part in the tender exercise and on or about 23 May 2003, submitted to Danaharta, a tender bid to acquire 220,965,222 Naluri shares out of the Naluri pledged shares representing 32% of the Naluri shares for a consideration of RM437,511,139.56 at RM1.98 per share. The second defendant's offer was accepted by Danaharta, resulting in a conditional agreement between the second defendant and Danaharta for the purchase of the Naluri pledged shares. The sale and purchase agreement (SPA) for the Naluri pledged shares was completed on 9 October 2004.

[10] As part of the conditions of the purchase of the Naluri pledged shares, the second defendant was also obliged to work with the SAs to ensure that Naluri maintains its PN10 status. This resulted in a PN10 proposal which was undertaken pursuant to the work-out proposal and (save for the proposed CPSB land acquisition) was deemed to be completed on 10 December 2004. With that completion, the SAs were released from their appointment from the administration of Naluri with effect from 18 December 2004 with the Board of Directors taking over the administration of Naluri.

[11] The plaintiff, as a result of the completion of the purchase agreement of the pledged Naluri shares filed this suit in his capacity as a shareholder of the Naluri for an order that the defendants jointly and severally make a mandatory take-over offer (MTO) to all shareholders at an offer price of RM1.98 per ordinary share in accordance with the terms of the Securities Commission Malaysia Act 1993 (SC Act) and the Take-Over Code (Code) and for damages. The plaintiff's action is premised on the fact that the defendants having obtained control of Naluri Bhd are required by law to make an MTO to the shareholders.

Our Grounds Of Decision

[12] In our view, there are basically two issues which require our deliberations and they are these:

(a) whether the plaintiff has the *locus standi* to launch this suit against the respondents in the context of the SC Act?

(b) if so, whether the plaintiff had proved that the respondents are legally required to make compulsory take-over offer to all shareholders of Naluri as prescribed by the SC and the Code?

Issue 1: Locus standi

[13] The learned High Court Judge had dismissed the plaintiff's claims premised mainly on the ground that the SC Act does not confer on the plaintiff a private cause of action for damages on alleged breach of statutory duties set out in the SC Act. Under the SC Act 1993, the controlling authority is that the Securities Commission and it has the exclusive jurisdiction to deal with breaches of the SC Act by any public company. The learned judge had relied on the case of *Tuan Hj Zulkifli Hj Hussain & Ors v. IOI Corporation Bhd & Ors* [2012] 4 CLJ 401; [2012] 7 MLJ 215 for his decision.

[14] Before us, learned counsel for the plaintiff submits that the learned judge's reliance on the *Tuan Haji Zulkifli*'s case is misguided and urges us to follow three other decisions in the following cases:

(i) *Petaling Tin Bhd v. Lee Kian Chan & Ors* [1994] 2 CLJ 346.

(ii) *Aun Huat & Brothers Sdn Bhd & Ors v. Sime Darby Bhd & Anor* [2003] 8 CLJ 32; [2003] 6 MLJ 32.

(iii) *Extreme System Sdn Bhd v. Ho Hup Construction Company Bhd & Ors (No. 2)* [2010] 1 LNS 479; [2010] MLJU 486

[15] The relevant provision in the SC Act in this appeal is s. 153 which reads as follows:

> Civil liability of person in contravention of this Act
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> 153. (1) A person who suffers loss and damage by reason of, or by relying on, the conduct of another person who has contravened any provision of Part IV or any regulations made under this Act may recover the amount of the loss or damage by instituting civil proceedings against the other person whether or not that other person has been charged with an offence in respect of the contravention or whether or not a contravention has been proved in a prosecution.
>
> (2) Notwithstanding the provisions of any written law relating to limitation of time, an action under subsection (1) may be begun at any time within six years from the date on which the cause of action accrued or the date on which the person referred to in subsection (1) became aware of the contravention, whichever is the later.

[16] Premised on the aforesaid section, learned counsel for the plaintiff at p. 33 of his submission contends as follows:

> 61. The Section shows that:
>
> (a) Aggrieved minority shareholders CAN make an application to the court for damages independent and irrespective of any action by the Securities Commission;

(b) An aggrieved person pursuant thereto CAN institute a civil proceeding, regardless of whether the alleged wrongdoer has been charged;

(c) S 155(1) which states the Commission "MAY" shows that the Commission is NOT under an obligation to institute an action and cannot be read as derogating from the shareholders' right to institute his own action.

[17] It is also the submission of learned counsel that the learned judge erred in relying on the decision in *Tuan Haji Zulkifli (supra)* on the ground that s. 153 SC Act was not considered by Her Ladyship in that case.

[18] We have read the judgment in *Tuan Haji Zulkifli*'s case and agree with learned counsel that the relevant provision of law in question is not s. 153 SC Act but a different set of legislation. Her Ladyship in her detailed analysis on this area of law had rightly started off by stating that common law does not recognise 'breach of a statutory duty' as a private cause of action and such cause of action can only exist when statute law confers the same. We have no argument with such statement of law. Her Ladyship then went on to discuss the then relevant legislations to determine whether the same created a private cause of action and concluded as follows:

> [75] ... It appears to me that this is not the case. While it is true that the Code and hence the regulatory provisions are enacted for the benefit of a sub-class, it is equally true that this in itself is insufficient to warrant the conclusion that such a cause of action was conferred by the particular statute. This is true of both the cases of *X (minors) v. Bedfordshire City Council* (above) per Lord Wilkinson-Browne, as well as Lord Diplock in *Lonrho v. Shell Petroleum Co. Ltd (No. 2)* (above) where specific reference was made to the fact that where legislation is enacted for the specific benefit of a particular class of persons, it comprises an indicator of the fact that Parliament intended to confer such a private law cause of action. However in both those cases, while this principle was acknowledged, the ultimate finding was that notwithstanding this, the overall intention of the particular statute in question did not intend to confer such a private law cause of action

[19] The learned judge in the case of *Extreme System Sdn Bhd v. Ho Hup Construction Company Bhd & Ors (supra)* however took a different stand and found that s. 153 SC Act provides a private cause of action to shareholders. This is what the learned judge said:

> 28. With respect, I am unable to agree with the submission by Counsel for the Defendants that the common law private cause of action, recognised in *Petaling Tin*'s case and *Aun Huat*'s case, would have been abrogated by the enactment and coming into force of section 153 SCA on 1/1/1999. Instead, section 153 SCA shows the clear intent of the legislature to expose any errant party who has failed to observe the Code to a claim for damages. I do not think that section 153 SCA could have deprived a litigant from his other common law rights. In *Petaling Tin*'s case, the relief granted by the Supreme Court was a declaration.

> 29. Accordingly, I find that the repeal of section 153 SCA with effect from 28/9/2007 (P.U. (B) 342 and 343) by the Securities Commission (Amendment) Act 2007 did not affect the existing private law cause of action under the SCA and the Code. This is more so when section 153 SCA was intended to be replaced by section 357 CMSA, which provides for a similar cause of action for damages. Section 357 CMSA has not been brought into force yet. Notwithstanding, I do not see these amendments as reflecting an intention by the legislature to take away the private law cause of action.

[20] We have thus two conflicting decisions of the High Court and we are duty bound to decide which approach is the more appropriate interpretation. But before we do that, we should restate certain established principles of law and they are these.

[21] Breach of statutory duty *per se* does not give rise to a private law cause of action. It is best explained by the learned authors in *Tort Law* (3rd edn) by Nicholas J. MacBride and Roderick Bagshaw where they lucidly put it this way:

> By definition the breach of a statutory duty that is owed to no one in particular cannot amount to a tort. But even the breach of a statutory duty that is owed to another will usually not amount to a tort. The breach of a statutory duty that is owed to another will only amount to a tort if when Parliament created that duty it intended that breach of that duty should be treated as a tort by the courts and therefore that all the remedies that are normally available when someone has committed a tort should apply to the breach of that statutory duty. As this is a bit of a mouthful, let's just say that the breach of a statutory duty owed to another will only amount to a tort if Parliament intended, when it created that duty, that breach of that duty should be 'actionable in tort'.

[22] The House of Lords in *X (Minors) v. Bedfordshire County Council* [1995] 3 WLR 152, through Lord Browne-Wilkinson at p. 166 puts it in this manner:

> The basic proposition is that in the ordinary case a breach of statutory duty does not by itself, give rise to any private law cause of action. However a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty ...
>
> If the statute does provide some other means of enforcing the duty that will normally indicate that the statutory right was intended to be enforceable by those means and not by private right of action: *Cutler v. Wandsworth Stadium Ltd.* [1949] AC 398; *Lonrtio Ltd. v. Shell Petroleum Co. Ltd. (No. 2)* [1982] AC 173. However, the mere existence of some other statutory remedy is not necessarily decisive. It is still possible to show that on the true construction of the statute the protected class was intended by Parliament to have a private remedy.

[23] The question then before us is whether s. 153 of the SC Act evokes an intention of Parliament to give a private cause of action for breach of a statutory duty which in this case the mandatory take-over offer to other shareholders of Naluri to purchase their shares.

[24] As in any construction of statutory provisions of law, courts, apart from giving the words used their natural meaning, cannot look at the relevant provision in isolation but must view it in the context of other provisions in the Act so that the whole Act can be read consistently. This approach is exemplified by what Mason J (dissenting) said in *K & S Lake City Freighters Pty Ltd v. Gordon & Gotch Ltd* (1985) 157 CLR 309 at 315:

> Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasise the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to interpretation insists that the context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise. In Prince Ernest Augustus of Hanover Viscount Simonds said:
>
> > ... words and particularly general words, cannot be read in isolation; their colour and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I use the word "context" in the widest sense ... as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in *pari materia*, and the mischief which I can, by those and other legitimate means, discern the statute was intended to remedy.

[25] Applying the aforesaid principle of construction, we find the following provisions in the SC Act instructive:

> Section 33A(4)
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> The Commission shall administer the Code according to the objectives specified in subsection (5) and may do all such things as may be necessary or expedient to give full effect to the provisions of this Division and the Code; and without limiting the generality of the foregoing, may:
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> (a) issue rulings from time to time, interpreting the Code;
>
> (b) issue rulings on the practice and conduct of persons involved in or affected by any take-over offer, merger or compulsory acquisition, or in the course of any take-over, merger or compulsory acquisition; and
>
> (c) enquire into any matter relating to any take-over offer, merger or compulsory acquisition whether potential or otherwise, and for this purpose, may issue public statements as the Commission deems fit with respect thereto.

Section 33A(5)

In making any recommendation under subsections (1) and (2) and in administering the Code and exercising its powers under this Act, the Commission shall take into account the desirability of ensuring that the acquisition of voting shares or control of companies takes place in an efficient, competitive and informed market and, without limiting the generality of the foregoing, shall have regard to the need to ensure:

(a) that the shareholders and directors of an offeree and the market for the shares that are the subject of the take-over offer -

(i) are aware of the identity of the acquirer and offeror;

(ii) have reasonable time in which to consider a take-over offer; and

(iii) are supplied with sufficient information necessary to enable them to assess the merits of any take-over offer;

(b) that, so far as practicable, all shareholders of an offeree have equal opportunities to participate in benefits accruing from the take-over offer, including in the premium payable for control;

(c) that fair and equal treatment of all shareholders, in particular, minority shareholders, in relation to the take-over offer, merger or compulsory acquisition would be achieved; and

(d) in its response to, or making recommendations with respect to any take-over offer, merger or compulsory acquisition, the directors of the offeree and acquirer shall act in good faith to observe the objects, and the manner in which they observe the objects, specified in this subsection, and that minority shareholders are not subject to oppression or disadvantaged by the treatment and conduct of the directors of the offeree or the acquirer.

Section 33D(1)(a)-(g)

(1) Where any person who is under an obligation to comply with, observe or give effect to the provisions of the Code or any ruling made under subsection 33A(4), fails to comply with, observe or give effect to any such provision of the Code or ruling (hereinafter referred to as the 'defaulting person'), the Commission may take one or more of the following actions:

(a) direct the defaulting person to comply with, observe or give effect to any such provision of the Code or ruling;

(b) impose a penalty not exceeding two hundred and fifty thousand ringgit on the defaulting person;

(c) reprimand the defaulting person;

(d) direct a stock exchange to deprive the defaulting person access to the facilities of the stock exchange;

(e) where the defaulting person is a listed corporation, direct the stock exchange:

(i) to suspend trading in the securities of the corporation;

(ii) to suspend the listing of the corporation; or

(iii) to remove from the official list the corporation or the class of securities of the corporation;

(f) where the defaulting person is a corporation that is not listed, direct any stock exchange to prohibit the listing of any of its securities;

(g) direct a stock exchange to prohibit the defaulting person from engaging in transactions to be executed through the use of the facilities of the stock exchange.

Section 33D(2)

The Commission shall give a written notice to a defaulting person of its intention to take action under subsection (1) and shall give the defaulting person an opportunity to be heard prior to it taking any action under subsection (1).

Section 33D(3)

The Court may, in a case where the Commission gives a direction under paragraph (1) (a), on an application by the Commission, make an order directing the defaulting person to comply with, observe or give effect to those provisions of the Code or rulings.

[26] It is our view that premised on the aforesaid provisions, it can be said that it is the intention of Parliament for the Securities Commission to be tasked to supervise, regulate, issue rulings from time to time and enforce the practices of companies bound by the SC Act 1993 and the Take-Over Code. The learned judge in the High Court in fact found that the only remedy available to the plaintiff was to complain to the Securities Commission about the conduct of the defendants and if the Securities Commission failed to act or makes a ruling unfavourable to the plaintiff, his only option was to apply to the court for judicial review of the decision of the Securities Commission. In short, the plaintiff's remedy was one of public law.

[27] To revert back and recapitulate s. 153, it states that:

A person who suffers loss and damage by reason of, or relying on, the conduct of another person who has contravened any provision of Part IV or any regulations made under this Act may recover the amount of the loss or damage by instituting civil proceedings against the other person whether or not that other person has been charged with an offence in respect of the contravention or whether or not a contravention has been proved in a prosecution.

It is a cardinal rule of construction of statute that courts must give the words used their natural meanings and applying the same, we cannot get away from the fact that the words used are also quite explicit in giving a person who had suffered damage a private cause of action to recover the same from anyone who had failed to comply any provision of the law.

[28] As we have intimated earlier, in construing s. 153 we must take into consideration of other provisions in the SC Act to discern the context. Hence in doing so, we agree with learned counsel for the defendants that the plaintiff's right to sue can only exist when the Securities Commission had made a ruling. In the case before us, the Securities Commission must first make a ruling that the defendants had acquired control of Naluri in the context of the relevant law and was required to make the mandatory take-over offer to the shareholders of the Naluri. From the record of Appeal, it is undisputed that the Securities Commission was aware of the allegation of the defendants having "acquired control" of Naluri and had sought clarification from the Board of Directors of Naluri. The Securities Commission after considering Naluri's clarification took no further action. As intimated above, the plaintiff should have sought a review of the Securities Commission decision in court. This he did not do.

[29] If we were to adopt the interpretation of s. 153 of the SC Act of the plaintiff, it would amount to the court stepping into the shoes of the Securities Commission which is tasked to supervise and regulate the conduct of companies. As we have said earlier, that is not and cannot be the intention of Parliament. Our interpretation reconciles s. 153 with the other provisions in the SC Act and that is the private cause of action for breach of statutory duty is preserved to the extent only after the Securities Commission has made a specific ruling. This would avoid a situation where there would be two decisions, one of the court and the other the Securities Commission. This scenario would bring uncertainty to the business world which must be avoided. Our interpretation allows only one decision at one time and that is the decision of the Securities Commission until the same is either set aside or substituted by the courts.

Issue 2: Acquired Control

[30] In view of our opinion on the issue of *locus standi*, we do not find it necessary to deal with this issue.

Conclusion

[31] This is a case involving construction of a statutory provision where the courts had to reconcile one provision with the other provisions of the SC Act without doing damage to the words employed in the legislation.

[32] Our view, with respect, differs to that of the learned judge in that he had ruled that there is no private cause of action by the plaintiff at all under the SC Act. We say that there is but it exists only after a ruling by the Securities Commission as we have set out above.

[33] Accordingly, we dismiss the appeal with costs of RM20,000 each to the first respondent and the second respondent. The orders of the High Court are affirmed and we further order that the deposit to be refunded to the appellant.